1997

Brown's Shoe Fit Co., Tom Brown, Brown's General Offices v. Jon Olch, Janet Olch, Henry Sigg, 330 Main Street Partners : Reply Brief

Utah Court of Appeals

Richard D. Burbridge; Burbridge & Mitchell; Robert Felton; Attorneys for Appellees.
R. Paul Van Dam; Bruce Wycoff; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellants.
R. Paul Van Dam (#3312) Bruce Wycoff (#4448) JONES, WALDO, HOLBROOK & MCDONOUGH 1500 First Interstate Plaza 170 South Main Street Salt Lake City, Utah 84101 Attorneys for Appellants
Richard D. Burbidge Stephen B. Mitchell BURBIDGE & MITCHELL 139 E. South Temple, Suite 2001 Salt Lake City, Utah 84111 Robert Felton 3 9 Exchange Place Salt Lake City, Utah 84111 Attorneys for Appellees 7

IN THE UTAH COURT OF APPEALS

BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; and, BROWN'S GENERAL OFFICES, an Iowa corporation,	)	
Plaintiffs/Appellants,	)	
vs.	)	No.970199-CA
JON OLCH; JANET OLCH; HENRY SIGG; and 330 MAIN STREET PARTNERS,	)	
	)	Priority 15
Defendants/Appellees	)	

APPELLANTS' REPLY BRIEF

Appeal from the Third Judicial District Court of
Summit County, State of Utah
Honorable Pat B. Brian, District Judge, Presiding

R. Paul Van Dam (#3312)
Bruce Wycoff (#4448)
JONES, WALDO, HOLBROOK
& McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for Appellants

Richard D. Burbidge
Stephen B. Mitchell
BURBIDGE & MITCHELL
139 E. South Temple, Suite 2001
Salt Lake City, Utah 84111

Robert Felton
39 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Appellees

IN THE UTAH COURT OF APPEALS

BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; and, BROWN'S GENERAL OFFICES, an Iowa corporation, Plaintiffs/Appellants, vs. JON OLCH; JANET OLCH; HENRY SIGG; and 330 MAIN STREET PARTNERS, Defendants/Appellees	)	No.970199-CA Priority 15

APPELLANTS' REPLY BRIEF

Appeal from the Third Judicial District Court of
Summit County, State of Utah
Honorable Pat B. Brian, District Judge, Presiding

R. Paul Van Dam (#3312)
Bruce Wycoff (#4448)
JONES, WALDO, HOLBROOK
& McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101
Attorneys for Appellants

Richard D. Burbidge
Stephen B. Mitchell
BURBIDGE & MITCHELL
139 E. South Temple, Suite 2001
Salt Lake City, Utah 84111

Robert Felton
39 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

MISCELLANEOUS

I. ARGUMENT

A. The June 11, 1996 Proceedings Were Not a Motion for Summary Judgment; The Trial Court Made Evidentiary Rulings on No Evidence; The Olches Misrepresent the Record.

At the conclusion of the June 6, 1996 hearing the trial court gave no indication that the hearing to begin two hours before the June 11 trial would be anything in the nature of a summary judgment hearing: "The Court is persuaded that the issue of whether or not the question of specific performance is for the judge or jury to decide should be argued and ruled upon prior to trial. Resolution of this issue would have substantial bearing on the amount of time needed for trial." (R. 1143).

The only summary judgment proceeding in this case occurred on December 11, 1995, before Judge Frank G. Noel. Judge Noel denied the Olches' motion, finding in his order[1] that the parties had

---

[1] At page 18 n.3 of their opposing brief, the Olches argue that Judge Noel's order was a legal nullity. To the contrary, it was a binding order that thereafter established the law of the case on all matters not specifically superseded by a later court order. Utah R. Civ. P.7(b)(2) provides, in part:

> Orders. An order includes every direction of the court including a minute order made and entered in writing and not included in a judgement. . . .

Before the promulgation of Rule 7(b)(2), its purpose was served by a statute, rather than a rule:

> Every direction of a court or judge, made or entered in writing and not included in a judgment, is denominated an order.

Utah Code Ann. § 104-42-1 (1943).

In Foreman v. Foreman, 111 Utah 72, 176 P.2d 144, 149 (1946) the plaintiff argued that the court was powerless to hold her in contempt for failing to obey an oral order. In rejecting her contention, the Utah Supreme Court construed § 104-42-1:

(continued...)

entered into a contract, that the contract had sufficient terms to be enforced, and that the parties intended to be bound by the terms of a lease. (R. 495, Add. B). Judge Pat B. Brian, Judge Noel's successor, never made any finding that the parties did not intend to be bound. Thus, Judge Noel's order does establish the law of the case below regarding intent.

If the June 11 hearing had in fact been a summary judgment proceeding Brown's would have responded with appropriate counter-affidavits and deposition testimony.[2] Brown's did not do so

---

[1] (...continued)

> [S]aid order was reduced by the clerk of the court as a minute entry. We hold that this is all that Section 104-42-1 requires. We have an order of the court "entered in writing" by the clerk of the court . . .
>
> * * *
>
> Since we hold that the order in the form given by the court was a valid, lawful order it follows that the plaintiff's disobedience is a contempt of court . . .

The trial court reduced its December 11, 1995 Order to writing. (R. 495, Add. B). Foreman and Utah R. Civ. P. 7(b)(2) therefore establish that an oral order by a judge is in fact an "order" once reduced to a minute entry. Admittedly, Judge Noel's order was not a "final" order as defined in Utah R. App. P. 4(a), but that is not the issue.

[2] At pages 44-45 of their opposing brief, the Olches claim that Brown's has somehow waived its right to argue the June 11 hearing was not a summary judgment hearing. Brown's is not arguing, however, that the trial court had no right to schedule the June 11 hearing. Brown's point is that the June 11 hearing the trial court scheduled was not a summary judgment hearing. The procedure the Olches and the trial court followed ambushed Brown's to the extent the hearing evolved – two hours before trial – into a summary judgment hearing. As a consequence, the decisions the Olches cite at page 46 of their opposing brief are largely irrelevant. Moreover, in Crookston v. Fire Insurance Exchange, 817 P.2d 789, 796 (Utah 1991), the Court held that the scheduling of a summary judgment hearing to be heard in less than 10 days "will void the grant unless the violation amounts to harmless error." Brown's shows below that the procedure the trial court followed was hardly harmless. In Timm v. Dewsnup, 851 P.2d 1178, 1182 (Utah 1993) the Court overturned a summary judgment on issues that the (continued...)

because there was no indication at any time prior to that hearing that the trial court would make any evidentiary rulings. This procedure effectively ambushed and sandbagged Brown's when the Olches made, and the trial court considered, evidentiary arguments at the hearing.

The consequences of this procedure appear throughout the Olches' opposing brief. One example is illustrative of all: At page 43 the Olches argue that "there was not ever any contention in this case" of a certain factual issue. When, however, Brown's asked the trial court to make findings regarding Brown's contentions and proffers of what the trial evidence would have been, the Olches successfully argued to the trial court:

> Your honor makes findings of fact, conclusions of law, and a ruling. Now Counsel wants to come in and say let's put in what our contentions are, and then let me speak for the defendants, and argue what their contentions might have been, had the case been tried and gone to a jury. That is wholly improper in findings of fact and conclusions of law. They are not to set forth the contentions. (R. 1533-34).

In this case, the Olches'

> method of putting allegation before factual inquiry is reminiscent of the trial in **Alice in Wonderland** . . .
>
> > Consider your verdict," the King said to the jury.
> >
> > "Not yet, not yet!" the Rabbit hastily interrupted. "There's a great deal to come before that!". . . .

---

[2] (...continued)
notice of hearing did not make "express reference to." The Olches argue at page 46 that the parties "had fully briefed all the legal issues." They do not contend, nor can they in good faith contend, however, that Brown's ever had any reason to believe, or warning, that they were required to file with the court before that hearing all of Brown's evidence on all those legal issues.

> "Give your evidence, said the King: "and don't be nervous, or I'll have you executed on the spot.". . . .
>
> "No, no!" said the Queen. "Sentence first — verdict afterwards."

Sexton v. Servaas, 830 F. Supp. 475, 480 n.5 (S.D. Ind. 1993), dismissed on other grounds, 844 F. Supp. 471 (1994).

The trial court characterized the June 11 hearing in advance as merely a hearing on purely legal issues.[3] Over its course it expanded from a hearing on the narrow issue of whether a judge or jury should decide overriding specific performance questions to a hearing on a motion to dismiss. The Olches' counsel never disputed until their brief Brown's counsel's characterization of the June 11 hearing as involving a "motion to dismiss". (R. 1500, 1534). This Court affirms a motion to dismiss "only where it clearly appears that the plaintiff or plaintiffs would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim." See e.g., Brittain v. State, 882 P.2d 666, 668 (Utah App. 1994) (emphasis added).

To justify their receiving a "sentence before the verdict", the Olches adopt the behavior of another Alice in Wonderland character:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

---

[3] At pages 46-47 of their opposing brief, the Olches contend that "Brown's obtained the dismissal of the claims asserted by 330 Partners in its counterclaim." An examination of the record discloses, however, that the trial court dismissed that claim sua sponte, and as a matter of law. Brown's counsel"obtained" nothing. He merely gave two short responses totalling sixteen lines to questions that the trial court directly asked him. (R. 1323).

> "The question is," said Alice, "whether you *can* make words mean so many things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."

L. Carroll, Alice Through the Looking-Glass (1872) (quoted in United States v. Hooper, 935 F.2d 484, 499 (2d. Cir. 1991) (Pratt, J., dissenting)).

An examination of the record in this case makes clear that the Olches' claimed "undisputed" facts are not undisputed at all, and that Brown's could prove facts sufficient to support their claims.

First, the Olches repeat ad nauseam their incantation that "Brown's would not have entered into a lease unless 330 Partners agreed to all of the more than thirty changes demanded by Brown's counsel in October, 1994." (Olches' Brief at 39-40; see also id. at 8, 11, 16, 44). In truth, Tom Brown repeatedly testified that Brown's was willing to negotiate those items. (R. 257, numbered page and unnumbered reverse page).

Second, the Olches repeatedly assert that Brown's would not have entered into a lease unless it represented a "binding" agreement to lease for the two option periods. (Olches' Brief at 10, 16, 48). Again, this statement palpably misrepresents Tom Brown's testimony. The Olches tried this same misrepresentation before the trial court by repeatedly asking it to expressly find that Brown's insisted on "enforceable" option periods. (R. 1360, 1477-79; 1482). The trial court refused to make any such finding. (R. 1482; 1485; 1422, Add. C). Because the trial court refused to find Brown's insisted on "enforceable" option periods, the Olches now assert, Humpty Dumpty-like, that Brown's insisted on "binding"

option periods. The two words are synonymous. The trial court "found"[4] that Brown's insisted on neither.

Third, the Olches assert that Brown's tried to get the Olches to agree on the option period lease rates before Brown's would sign a lease. (Olches' Brief at 9, 12, 13). To the contrary, the testimony at trial would have been that the Olches, not Brown's, insisted on establishing in advance the option period lease rates. (R. 1314, 1359, 1369).

In that regard, the Olches' counsel wrote Brown's counsel on September 22, 1994: "[T]he [Olches'] request for your client to come back to 330 Main Street Partners with a lease proposal, based on the $30 per square foot market rate, needs to be answered by the end of the day Monday, September 26th."

Fourth, the Olches erroneously assert that "all of the negotiations between the parties for a lease were in writing." (Olches' Brief at 38, 44). Tom Brown's trial testimony would have been that during a September 14, 1994 telephone conversation with defendants Jon Olch and Henry Sigg, Olch and Sigg expressed their desire to establish the option period lease rates before the execution of the lease. On September 19, Tom Brown replied in writing that he could not "respond" to Olch's and Sigg's request to

---

[4] Brown's counsel questioned the necessity or appropriateness of "findings" under the circumstances: "But findings in the context of a motion to dismiss are a real funny animal. These are not like findings anywhere else in jurisprudence, because there are no facts, except for anything that may have been stipulated to. The only thing in here that truly is a classic finding is finding 14." (R. 1500). In any event, the trial court properly determined that Brown's never required "enforceable" or "binding" option periods. Brown's only expected the Olches to negotiate option period rents in good faith. See page 20, infra.

establish option-period rents as quickly as he had hoped. (R. 887).

The evidence at trial would further have been that on September 22, 1994 the Olches' counsel[5] wrote Brown's counsel confirming that the parties had conducted oral discussions "over the past four to six weeks." The Olches' counsel continued: "It is my understanding that, based on those discussions, the only remaining point to be settled between the parties is that of the rental rate." On September 30, Brown's counsel concurred that the parties had reached agreement on all terms except rent, and also noted that the Olches', not Brown's, had urgently insisted on establishing the option period rents then, rather than at the beginning of each option period. (R. 259) Brown's counsel made the appraisal suggestion that the Olches refer to at page 28 of their brief solely in the context of the Olches' urgent demand that Brown's propose within four days future option period renewal rates acceptable to the Olches. Tom Brown would have testified that he and the Olches ultimately agreed to establish the option period renewals at "fair market value". (R. 882, 883, 887, 1370).

The truly undisputed facts before the trial court did not justify its dismissal of Brown's claims. Moreover, the legal posture of that hearing gave Brown's no advance notice that the trial court expected Brown's to put all their evidence in the

---

[5] Because the Olches' (the parties to be charged) counsel wrote this letter, it is immune from the Olches' statute of frauds arguments. Moreover, the Olches' entire statute of frauds argument ignores the impact of Restatement (Second) of Contracts, § 139. See generally Medesco, Inc. v. LNS Int'l., Inc., 762 F. Supp. 920, 926-27 (D. Utah 1991). Medesco and § 139 make clear that the Olches' statute of frauds argument is unavailing. (R. 1278).

record at a hearing two hours before trial. There was no factual basis for the trial court's dismissal of Brown's claims. Brown's shows in the following subpoints that the trial court also improperly applied the law to Brown's claims.

B. <u>The Jury, Not the Trial Court, Should Have Determined Brown's Fraud Claims</u>.

Curiously, the Olches nowhere in their opposing brief attempt to justify the trial court's Conclusion Nos. 4, 5 and 6. (R. 1424-25, Add. C).

In his August 5, 1994 letter (R. 882), defendant Jon Olch baldly admits that (1) he needed the Basic Lease to obtain financing[6]; (2) he never intended to honor the Basic Lease; and (3) he and defendant Henry Sigg told Brown's that the Premises "would be ready for occupancy by the end of 1994."

Brown's trial evidence would have been that the Olches were aware that upon their execution of the Basic Lease, Brown's immediately ordered approximately $170,000 worth of shoes for sale at the Premises during the Winter 1994-95 season. (R. 262, 301, 492, 1302-05, 1371-72). The Olches knew that Brown's made that major financial commitment, and had retained an interior designer, in reliance on an agreement the Olches at that time had no intention of honoring. In fact, defendant Sigg encouraged Brown to ship those shoes for storage to a shed Sigg owned. (R. 1303, 1372). In response to all this evidence of their duplicity, the Olches respond with a single legal argument: Brown's suffered no damages. (Olches' Brief at 48). In addition to benefit-of-the-

---

[6] On October 8, 1993 Brown's gave the Olches a letter (R. 991) necessary for them to obtain financing. (R. 262). The Olches never explain why they needed a second letter to obtain financing.

bargain damages, a plaintiff may also recover reliance damages occasioned by fraudulent conduct. See, e.g., Lamb v. Bangart, 525 P.2d 602, 609 (Utah 1974). Whatever a jury may ultimately determine Brown's lost profits to be, Brown's unquestionably suffered reliance damages.

The Olches themselves cannot explain or justify the trial court's refusal to let the jury decide if Brown's suffered damages – out-of-pocket or lost profits – in reasonable reliance on the Olches' false representation that they intended to honor the Basic Lease. In fact, the trial court's insensitivity to the Olches' conduct in a fraud context prejudicially permeated its view of other legal issues.

C. The Basic Lease Is an Enforceable Contract; The Trial Court's Failure to Recognize that Fact Caused It to Commit Multiple Legal Errors.

1. The Basic Lease is a Contract.

In their Brief, the Olches make repeated references to the testimony of one of Brown's experts, Richard G. Robins ("Robins"). The Olches conveniently omit Robins' conclusion, based on his years of experience as a leasing agent of commercial retail property that in the Basic Lease the parties came to an economic agreement on the basis for a lease. (R. 958). All necessary parties signed the Basic Lease. They recited that the terms contained therein were "agreed upon". Thus, the Basic Lease was not an "agreement to agree". It was an agreement. It was a contract.

These inescapable facts distinguish this case from Crismon v. Western Company of North America, 742 P.2d 1219 (Utah App. 1987). There, the trial court specifically found, after trial, that various letters the parties exchanged constituted a mutual

rejection of each other's attempts to form an agreement. Relying on the basic contract law principle that a contract is not formed without a meeting of the minds, this Court affirmed the trial court's evidentiary finding. Crismon accordingly establishes nothing in this case, because the Basic Lease explicitly recites that each and every term and condition contained therein had been "agreed upon by and between" Brown's and the Olches.

The Basic Lease therefore memorializes the terms obligating the Olches to lease the Premises when completed to Brown's on the terms recited in the Basic Lease. Independent of any testimony by Rich Robins or anyone else, Judge Noel found as a matter of law[7] that the parties intended to be bound by its terms. Judge Brian made no contrary finding.

Accordingly, as Brown's show at pp. 1-2, supra, the law of the case below is that the Basic Lease is a contract binding the parties to its terms. Indeed, the very purpose of the Basic Lease was to bind Brown's and the Olches to its economic terms. Brown's showed at p. 13 of their initial brief that the Basic Lease contained all the essential terms of the parties' agreement and that the mere fact that part of the performance is that the parties will enter into a contract in the future does not render the original agreement any less binding. The Olches contend that the resulting lease would necessarily be some complicated, hyper-technical document. To the contrary, Brown's leasing expert,

---

[7] Utah law is "well settled" that "when a contract is in writing and the language is unambiguous, the intention of the parties must be determined from the words of the agreement . . . " See, e.g., R & R Energies v. Mother Earth Indus., 936 P.2d 1068, 1074 n.5 (Utah 1997).

Robins, would have testified that frequently in commercial leasing situations, the parties use a "boiler plate" lease. (R. 959).

The Massachusetts Supreme Court explained why the Basic Lease is a binding contract:

> The parties agreed in writing . . . to execute a lease in the future, and there is nothing in what they signed which permits an inference that it would have no effect until they signed the ultimate lease . . . From the moment the parties signed that document they were contractually bound to execute a lease in accordance with its terms, . . . No contract otherwise binding is to be treated as a nullity solely because it is a contract to execute still another document or instrument in the future. Every agreement for the purchase or sale of real estate contemplates the future execution of a deed and perhaps mortgages and other instruments, but such agreements are not by reason thereof alone unenforceable.

Sands v. Arruda, 270 N.E.2d 826, 829 (Mass. 1971).

Courts do not easily destroy such contractual rights:

> "Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point." . . . "[t]he law does not favor, but leans against, the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained."

Wong v. DiGrazia, 386 P.2d 817, 827 (Cal. 1963) (citations omitted).

2. The Basic Lease Can and Should Be Specifically Performed.

The trial court's failure to appreciate that the Basic Lease was a binding contract signed by all necessary parties led it to commit multiple legal errors. With respect to Brown's specific performance claim, the trial court failed to realize that the initial three-year term of the Basic Lease was the dog, and the two option periods were the tail. As a result, both the trial court and the Olches have the tail wagging the dog.

With respect to the initial three-year period the Olches argue only that the Basic Lease is not specifically enforceable because it lacks a commencement date. The Olches cite no authority for this naked assertion. In fact, the law is to the contrary: "The failure to specify a definite commencement date is not fatal to the creation of a term for years." Byrd Cos., Inc. v. Birmingham Trust Nat'l. Bank, 482 So.2d 247, 252 (Ala. 1985); cf., Orpheus Vaudeville Co. v. Clayton Inv. Co., 41 Utah 605, 128 P. 575, 578 (1912) (when a landlord is building, altering or repairing a building "the lessee usually is to take possession of the building or premises when completed, altered, or repaired, and the agreement often also contains a lease.") "Usual" covenants and provisions are incorporated into leases unless the parties manifest a contrary intent. See Wyuta Cattle Co. v. Connell, 299 P. 279, 282 (Wyo. 1931). Thus, the absence of an express commencement date is not fatal to Brown's specific performance claim.

The Olches make only one other argument regarding the unavailability of specific performance. They argue the rent for the two option periods is too indefinite for specific performance. The indefiniteness of option period rents is, however, no bar to the specific performance of an initial period that is subject to clear and definite rental rates. See e.g., Sands v. Arruda, 270 N.E.2d 826, 829 (Mass. 1971). The Olches identify no legal authority holding that the initial 3-year term of the Basic Lease

is unenforceable and void ab initio merely because the two option periods may be.[8]

In its Red Queen-like rush to order Brown's execution before hearing the evidence necessary to render a proper verdict on Brown's specific performance claims, the trial court ignored the analysis appropriate in all Utah specific performance actions:

> It may be perfectly proper for counsel to invoke every technical rule, whether applicable or not, to absolve his client from the contractual obligations assumed by the latter. It is not the duty of a court, however, to yield to the counsel's contentions in that regard, and to make a strained effort to find some flaw in a contract whereby a party may escape liability from performing a plain and unequivocal obligation which he voluntarily assumed, and for doing so has received and retains an adequate consideration.
>
> * * *
>
> "When land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established. Whenever a contract concerning real property is in its nature and incidents entirely unobjectionable—when it possesses none of those features which, in ordinary language, influence the discretion of the court—it is as much a matter of course for a court of equity to decree its specific performance as it is for a court of law to give damages for its breach." Where therefore, a contract is clearly established in which one of the parties bound himself to sell, or did sell, specific real property, a prima facie right to have such a contract specifically performed arises. If nothing is made to appear which could influence or invoke the

---

[8] The Olches do nothing to explain or justify the trial court's dismissal of Brown's specific performance claims because of non-joinder of the Tenants. Bonneville Tower Condominium Management Committee v. Thompson Michie Associates, 728 P.2d 1017 (Utah 1986) unequivocally holds that a trial court commits reversible error by dismissing a specific performance claim with prejudice because a plaintiff fails to join an indispensable party. The Olches' claim Bonneville Towers does not apply because there the dismissal occurred "at the outset" of the proceeding. (Olches' Brief at 34). The Olches do not explain, however, why the prejudice is greater at the outset than it is when defendants such as the Olches sandbag plaintiffs by waiting until 6 days before trial to raise the issue, as happened here.

> discretion of a court of equity to justify is refusal to decree specific performance, a decree requiring the party to perform must follow, as a matter of course, as stated by Mr. Pomeroy. (citation omitted).

Cummings v. Nielson, 42 Utah 157, 129 P. 619, 623-24 (1912).

Brown's is entitled to a decree of specific performance at least for the first three years the parties agreed to in the Basic Lease. Moreover, Brown's are entitled to a decree that the Olches are obligated to negotiate the terms of both the lease and the option period rents[9] in good faith.

3. The Olches Were Obligated to Negotiate (1) a Formal Lease; and (2) The Option-Period Rents in Good Faith.

Inexplicably, the trial court utterly failed to consider the covenant of good faith and fair dealing (the "Covenant") in its Findings and Conclusions. (R. 1417-27, Add. C). The trial court simply ignored and dismissed those claims.

The Olches' citation to Andreini v. Hultgren, 860 P.2d 916, 921 (Utah 1993) confirms that the Covenant governed the parties' conduct in connection with the Basic Lease. Andreini makes clear the Covenant governs the parties' conduct whenever there is "some type of preexisting contractual relationship." Brown's has shown at pages 9-10, supra, that the Basic Lease is a contract.

As a result, the authorities the Olches cite at pages 34-35 of their brief are irrelevant to this Court's analysis because none of the litigating parties had ever entered into a contract. For example, the Olches offer at page 35 an extended quotation from Trustees of the First Presbyterian Church v. Howard Company

---

[9] Brown's showed at pages 33 & n.9 of its initial brief, and at page 20, infra, that the trial evidence would have established that the parties' agreement regarding the option period rent was specifically enforceable.

Jewelers, 97 A.2d 144 (N.J. 1953). A later New Jersey opinion makes clear, however, that the Howard parties never reached a meeting of the minds on essential contract terms. See Berg Agency v. Sleepworld-Willingboro, Inc., 346 A.2d, 419, 423 (N.J. Super. 1975). The Berg court distinguished Howard from another situation where "both parties signed the same document so that there can be no question of the meeting of their minds on the provisions in that document." Id. at 423. Both the Olches and Brown's signed the Basic Lease. They became contractually bound to its terms, including the negotiation of a formal lease containing its terms.

Candid Productions, Inc. v. International Skating Union, 530 F. Supp. 1330 (S.D.N.Y. 1982), another decision the Olches rely on, reflects the same situation. There, the prior contract had expired, and Candid argued the defendant was required to negotiate a new contract in good faith. That is not the case here. Brown's and the Olches already had a contract that expressly required the parties to incorporate its provisions into a lease. The Candid court expressly observed that the law requires the Olches to negotiate the lease terms in good faith: "Where the parties are under a duty to perform that is definite and certain the courts will enforce a duty of good faith, including good faith negotiation, in order that a party not escape from the obligation he has contracted to perform." Id. at 1335 (citation omitted) (emphasis added).

Similarly, in Reprosystem B.V. v. SCM Corporation, 727 F.2d 257 (2d Cir.) cert. denied, 469 U.S. 828 (1984), the parties never jointly executed any agreement such as the Basic Lease that recited their agreement to all essential contractual terms. Instead, the

parties exchanged unsigned, see id. at 260, drafts that contained "provisions that conditioned their binding effect on formal execution and delivery." Id. at 262. The court therefore found there was no duty to negotiate an initial contract in good faith. See id. at 264. At the same time, however, the court recognized that in other situations, the parties "may be bound to negotiate in good faith to reach an agreement." Id. at 264.

One court, analyzing the holdings of both Candid and Reprosystem, concluded that those decisions did not require good-faith negotiations because the parties had never reached a binding underlying contract in either case:

> However, those cases deal with the so-called "agreement to agree," which is less an agreement than a stage of negotiations and which courts refuse to recognize as imposing limitations and obligations—i.e., which courts often refuse to recognize as a contract. See Candid Prods., 530 F. Supp. at 1334-35. We deal here with a fully enforceable contract with complete provisions on all essential subjects. To the extent that defendants are arguing that courts cannot second-guess negotiating tactics, they are incorrect. Courts are often called upon to determine whether a party negotiated in good faith. For example, courts must determine whether an insurance company failed to settle a personal injury lawsuit in good faith and instead subjected its insured to liability above his coverage.

In re Gulf Oil/Cities Servs. Tender Offer Litig., 725 F. Supp. 712, 739 (S.D.N.Y. 1984).

Likewise, a case the Reprosystem court referred to in its analysis explicitly confirms a duty to negotiate in good faith where, as here, there is an initial contract, such as the Basic Lease, that anticipates the execution of a formal agreement:

> There is, however, the argument that at the very least the agreement of May 8th carried with it the obligation to negotiate the terms of a definitive agreement in good faith and to execute the contract on the terms that had been agreed upon. For this argument,

> plaintiff relies on Itek Corp. v. Chicago Aerial Industries, Inc., 248, A.2d 625 (Del. 1968). Assuming that there was a binding agreement on May 8th, we would agree that an obligation to negotiate in good faith a definitive agreement was implied but, as Itek held, absent such good faith, plaintiff could sue for a breach of contract.

Pepsico, Inc. v. W.R. Grace & Co., 307 F. Supp. 713, 720 (S.D.N.Y. 1969).

More recently, one Federal District Court canvassed law reviews, treatises and judicial decisions from throughout the country before concluding that agreements to negotiate in good faith are not unenforceable as a matter of law. See Howtek, Inc. v. Relisys, 958 F. Supp. 46, 48 (D.N.H. 1997). In describing the required process, the Relisys court described the factual inquiry appropriate to determine whether good faith negotiations occurred:

> The question is whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiations as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith, but was unable to arrive at an acceptable agreement with the union.

Id. at 49 (citation omitted).

The Olches argue at page 36 of their opposing brief that Utah juries are incapable of making such a determination. The Olches never explain why, however. Brown v. Weis, 871 P.2d 552, 564 n.18 & 565 (Utah App. 1994) establishes that juries exist for the express purpose of making such determinations. Weis also makes clear that a trial court errs in deciding such issues in connection with a motion to dismiss or for summary judgment.

Brown's and the Olches specifically "agreed upon" the Basic Lease provisions, and agreed they would "incorporate" those provisions into a final lease to be executed by the parties.

Defendant Jon Olch admitted his duty to negotiate a formal lease. (R. 462). The Olches now seek to create the erroneous impression that the parties have already done their best to negotiate a lease, but have failed.[10] (Olches' Brief at 38-39).

In their initial brief at pages 9 and 50, Brown's showed that the two leases the Olches submitted materially changed the terms they had already agreed to in the Basic Lease. The Olches do not dispute they sought to change those terms. Because of the Olches' unilateral changes to the parties' binding agreement, Brown's was under no obligation to assent to, negotiate, or even consider, the Olches' proposed leases:

> [T]he parties to a contract to lease have the right to demand that the lease to be executed shall comply with the terms of the agreement, and a proffered lease which does not conform to the agreement need not be accepted or executed.

51C C.J.S. Landlord & Tenant § 196(4) (1968). In fact, the Olches' proposal of leases that changed the provisions of the Basic Lease constituted a refusal to perform on the Olches' part. See Lewis v. James, 285 P.2d 86, 89-90 (Cal. 1955). Similarly, "[a]n agreement

---

[10] At pages 10-11, 17 and 38 of their opposing brief, the Olches assert that they and Brown's did negotiate, but could not agree on "many" or "a number" of points, and that such failure indicated nothing more than "normal disagreements between a landlord and tenant." This facially reasonable statement ignores the facts that (1) the Olches insisted on provisions that materially changed the Basic Lease; and (2) "many" or "a number" of the disagreements resulted from commercially unreasonable and sometimes outrageous terms the Olches demanded. Brown's expert, Robins, testified in his deposition that in all his years of retail leasing experience he had "never seen" certain provisions before. (R. 980-81). If the trial court had permitted a trial, Brown's would have introduced evidence establishing the Olches' repeated insistence on terms designed to make their proposed leases unsignable. The situation the Olches created in the process was far from "normal disagreements between a landlord and tenants." The Olches were determined to "break" a contract they no longer needed once they obtained their financing.

to execute a lease is not broken by the refusal to sign a lease which imposes terms not provided for or contemplated in the agreement." Albiani v. United Artists Corp., 169 N.E. 435, 437 (Mass. 1930).

In Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc., 889 P.2d 445, 456 (Utah App. 1995) cert. denied, 899 P.2d 1231 (Utah 1995) this Court held that both landlords and tenants cannot exercise any discretion in a lease relationship capriciously or in bad faith. The Olches argue they have discretion regarding the ancillary terms of the lease the Basic Lease required the parties to negotiate. It necessarily follows that the Olches are bound to conduct those negotiations for those terms in good faith.

The Olches never truly engaged in negotiations, good-faith or otherwise. Instead, they twice demanded that Brown's accept terms directly contrary to terms the Olches had agreed to in the Basic Lease. In connection with its remand, this Court should either (1) order the Olches to specifically perform their obligation to engage in good-faith negotiations of a lease consistent with the Basic Lease; (2) instruct the trial court to permit the jury (a) to determine the usual non-economic terms of commercial retail leases, and (b) declare those terms to be the non-economic portions of the lease contemplated by the Basic Lease; (3) instruct the trial court that the Olches' failure to negotiate in good faith renders them liable as a matter of law for Brown's damages; or (4) instruct the trial court that the jury should determine whether the Olches' past conduct violated the Covenant.

Finally, the Olches do not address at all Brown's argument, at page 31 n.8 of their initial brief, that the Olches were also obligated to negotiate in good faith the rents for the option periods. At page 33 of their initial brief, Brown's identifies numerous courts that have specifically enforced agreements to set future lease rates at the fair market value existing at the time of renewal. Indeed, counsel for Brown's is aware of no reported decision holding that such a standard is too indefinite for enforcement. The Olches have not identified any such decision. Tom Brown would have testified that the parties agreed the option period rents would be the then-existing fair market value of the Premises. Accordingly, on remand, this Court should also instruct the trial court that if the jury finds the parties made such an agreement, the Olches are under the additional duty to negotiate these renewal rates in good faith, and that, if the parties are unable to agree on fair market value, the trial court is required to do so.

D. Individual Plaintiff Brown's General Offices Has a Legally Cognizable Claim

Brown's does not challenge the trial court's Finding No. 15 (R. 1422, Add. C). They do contend that Conclusion No. 9 (R. 1425, Add. C) in no way necessarily results from that finding.

In Kemp v. Murray, 680 P.2d 758, 760 (Utah 1984) the Utah Supreme Court expressly recognized that an individual partner has standing to sue a party who contracts with the partnership if the individual partner "suffered direct injury personally."

The analytical basis for this rule is the fact that all partners of a partnership are ultimately in privity of contract with entities that contract with the partnership:

> It is fundamental that all partners are agents of each other, that a contract entered into by the agent is a contract entered into by the principal and that all partners are liable on any contract executed by a single partner in the name of the partnership. If a partner may be sued for nonpayment or other breach of the contract, he certainly is privy to the contract.

Barnes v. Campbell Chain Co., Inc., 267 S.E.2d 388, 389 (N.C. App. 1980).

A plaintiff must either be (1) in privity with the defendant; or (2) a third-party beneficiary, in order to maintain an action for breach of contract. See, e.g., American Towers Owners Ass'n. v. CCI Mechanical, Inc., 930 P.2d 1182, 1187 (Utah 1996). Because Brown's General Offices was in privity of contract with the Olches, it has standing to sue for its foreseeable particularized damages. Privity renders superfluous the third-party beneficiary analysis the Olches suggest.[11] Accordingly, this

---

[11] Because the trial court erroneously ruled as a matter of law that Brown's General Offices could not sue for its particularized economic losses, it never permitted the jury to consider the foreseeability and amount of Brown's General Offices' individual damages.

In a related vein, the Olches suggest the trial court properly dismissed Brown's General Offices' claims because it had not properly pled them as special damages. Even if the special damages rule applies to this claim, trial courts err as a matter of law in dismissing special damages claims for failure to plead with specificity. See Costin v. Malone, 402 So.2d 1257, 1258 (Fla. App. 1981). Additionally, such dismissal impermissibly shifts the burden of proof:

> Moreover, the appellees did not meet their burden essential to obtain a summary judgment. The moving party must prove the non-existence of a material

(continued...)

court should reverse the trial court's Conclusion No. 9 (R.1425, Add. C) and order a trial of Brown's General Offices' separate and distinct damage[12] claims.

E. The Trial Court Correctly Dismissed the Olches' Counterclaim

The Olches' counterclaim was not, as they contend, for "abuse of process". An abuse of process claim relates only to events that occur after a lawsuit has been filed. See Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1570 & n.15 (D. Utah 1995) aff'd., 78 F.3d 597 (10th Cir. 1996). On the other hand, "[a]n action challenging the initiation of a lawsuit is an action for malicious prosecution or for wrongful bringing of civil proceedings, and not for abuse of process." Id. The Olches' counterclaim challenges Brown's initiation of this action. Accordingly, their claim is for malicious prosecution or wrongful bringing of civil prosecution.

---

[11] (...continued)
fact in issue. Here the appellees did not demonstrate that the appellants sustained no special damages. The appellees cannot shift this burden by pointing to the record and arguing that the appellants had neither alleged nor proven special damages.

Id.

[12] At page 40 of their brief the Olches gratuitously claim that they first learned of Brown's General Offices' damage claims "shortly before trial." In fact, by January 23, 1996 – 140 days before trial, and before the trial court even set the trial date (R. 573) – the Olches knew not only the existence, but also the exact amount ($293,525), of Brown's General Offices' claimed damages. (R. 541-542). Utah has no inflexible rule regarding the pleading of special damages. The only concern is whether a defendant has notice of a plaintiff's claimed damages. See Cohn v. J.C. Penney Co., Inc., 537 P.2d 306, 311 (Utah 1975). The Olches had ample notice.

To prevail on their claim, the Olches must satisfy the requirements of Restatement (Second) of Torts, §§ 674-76.[13] In its Finding Nos. 1-8 supporting the dismissal of the Olches' counterclaim (R. 1408, Add. D to this Brief), the trial court made findings on each element of the Olches' counterclaim.

Numerous judicial decisions [14] hold that whether a plaintiff had probable cause under §§ 674 and 675 is a question of law, not

---

[13] **§ 674. General Principle**

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

§ 675. Existence of Probable Cause

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

(a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or

(b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

§ 676. Propriety of Purpose

To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based.

[14] See, e.g., Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. _____, 123 L Ed 2d 611, 625 n.7, 626 (1993); Bradshaw v. State Farm Mut. Auto. Ins. Co., 758 P.2d 1313, 1321 (Ariz. 1988); Knight v. Cordry, 913 P.2d 1206, 1209 (Ks. App. 1995); Dutt v. Kremp, 894 P.2d 354, 357 (Nev. 1995); Greenberg v. Wolfberg, 890 P.2d 895, 903 n.29 (Okl. 1994); Alvarez v. Retail Credit Ass'n. of Portland, 381 P.2d 499, 502 (Or. 1963); cf., Sheldon Appel Co. v. Oliker, 765 P.2d 498, 504 (Cal. 1989) ("To avoid improperly deterring individuals from resorting to the courts for resolution of disputes, the common law affords litigants the assurance that tort liability will not be imposed for filing a lawsuit unless *a court* subsequently determines that the institution of the lawsuit was without probable cause." (Emphasis in original)).

of fact. Similarly, a determination of whether a legal position was "without merit" for purposes of Utah Code Ann. § 78-27-56 is a question of law, not of fact. See Jeschke v. Willis, 811 P.2d 202, 203 (Utah App. 1991). Relying on Judge Noel's initial finding in Brown's favor[15] (R. 495, Add. B), and its own view of the merits of Brown's filing of their complaint, the trial court expressly found that, as a matter of law, Brown's legal positions did not exhibit a lack of probable cause or a purpose other than securing a proper adjudication of Brown's claims. Because the Olches fail to marshal the evidence supporting the trial court's detailed findings, this Court assumes the record supports those findings. See, e.g., Macris & Assocs., Inc. v. Images & Attitude, Inc., 319 U.A.R. 33, 36 (Utah App. 1997).

The trial court thus correctly dismissed the Olches' counterclaim.

II. CONCLUSION

For the foregoing reasons this Court should reverse the trial court's dismissal of Brown's claims. It should affirm the trial court's dismissal of the Olches' counterclaim.

DATED September 17, 1997.

JONES, WALDO, HOLBROOK & McDONOUGH

By _____
R. Paul Van Dam
Bruce Wycoff
Attorneys for Appellants

[15] In its ruling the trial court explained part of its thought process: "There is, in the Court's opinion, evidenced by the ruling of Judge Noel, a basis for reasonable people to differ on whether an enforceable agreement existed between plaintiff and defendant." (R. 1324)

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing APPELLANTS' REPLY BRIEF was hand-delivered on the 17th day of September, 1997, to the following:

Robert Felton
39 Exchange Place, #200
Salt Lake City, Utah 84111

Richard D. Burbidge
Stephen B. Mitchell
BURBIDGE & MITCHELL
139 East South Temple, Suite 2001
Salt Lake City, Utah 84111

Bruce Wycoff

228183

IN THE UTAH COURT OF APPEALS

BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; and, BROWN'S GENERAL OFFICES, an Iowa corporation, Plaintiffs/Appellants, vs. JON OLCH; JANET OLCH; HENRY SIGG; and 330 MAIN STREET PARTNERS, Defendants/Appellees	)	No.970199-CA Priority 15

ADDENDUM

Addendum D

R. Paul Van Dam (USB #3312)
Bruce Wycoff (USB #4448)
Attorneys for Plaintiffs/Counterdefendants
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
170 South Main Street
P. O. Box 45444
Salt Lake City, Utah 84145-0444
Telephone: (801) 521-3200

IN THE THIRD JUDICIAL DISTRICT COURT FOR SUMMIT COUNTY

STATE OF UTAH

BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; and BROWN'S GENERAL OFFICES, an Iowa corporation,

Plaintiffs,

vs.

JON OLCH, JANET OLCH, HENRY SIGG, and 330 MAIN STREET PARTNERS,

Defendants.

JON OLCH, JANET OLCH, HENRY SIGG, and 330 MAIN STREET PARTNERS,

Counterclaimants,

vs.

BROWN'S SHOE FIT CO., an Iowa corporation; BROWN'S SHOE FIT CO., an Iowa partnership; TOM BROWN; BROWN'S GENERAL OFFICES, an Iowa corporation; and John Does 2-5,

Counterdefendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CIVIL NO. 950300038CN

A hearing was held in this matter on June 11, 1996 at the hour of 8:30 a.m., at the commencement of trial, for the purpose of addressing certain legal issues in the matter. Plaintiffs appeared in person and by and through their counsel of record, Paul Van Dam and Bruce Wycoff of Jones, Waldo, Holbrook & McDonough. Defendants Jon and Janet Olch appeared in person and by and through their counsel of record, Richard D. Burbidge of Burbidge & Mitchell. Defendants 330 Main Street Partners and Henry Sigg appeared in person and by their counsel of record Robert Felton.

The court, at an earlier hearing held June 6, 1996, had requested that both parties file memoranda respecting the legal issues that they believed should be determined by the court prior to and/or during the trial. Both parties filed written memoranda as requested by the court.

The court, having carefully reviewed the memoranda filed by the parties and having heard extensive oral arguments and the responses by counsel to specific inquiries by the court concerning undisputed facts and the respective positions of the parties, and the court being fully apprised in the matter, hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The court determines that there is no material dispute regarding the following facts:

1. Plaintiffs, Brown's Shoe Fit Co., Brown's General Offices, and Tom Brown took an active part in the initiation of civil proceedings against defendants in this matter.

2. At a December 11, 1995 hearing Judge Frank G. Noel ordered that the March 18, 1994 Basic Lease Provisions constituted an enforceable contract between the parties, and that the parties intended to be bound by its terms.

3. The plaintiffs did not act in bad faith or without a factual basis in filing their Complaint herein.

4. There was a basis for reasonable people to differ on whether an enforceable agreement existed between the plaintiffs and the defendants.

5. Plaintiffs acted in good faith in asserting their claims against defendants. Plaintiffs did not act unreasonably or in any way approach this lawsuit for totally wrong reasons.

6. Plaintiffs filed their Complaint primarily for the purpose of securing the proper adjudication of their claims stated in the Complaint.

7. Plaintiffs' belief in the facts on which their Complaint was based was reasonable.

8. Plaintiffs' belief that under those facts their claims might be valid under applicable law was reasonable.

9. Some time after filing their Complaint, plaintiffs caused a lis pendens to be recorded against the property which was the subject matter of this action.

10. The plaintiffs did not act in bad faith or without probable cause in recording that lis pendens.

11. Plaintiffs did not record the lis pendens for an ulterior purpose for which it was not intended.

CONCLUSIONS OF LAW

1. A person is liable for the wrongful use of civil proceedings only when that person acts without probable cause, for the purpose of harassment or annoyance and with malice. In other words, to be actionable, such an action must be brought primarily for a purpose other than that of securing the proper adjudication of the claims on which the proceedings are based.

2. Plaintiffs are not liable to defendants for wrongful use of civil proceedings.

3. A person is liable for abuse of process if, even though an action may have been properly initiated, and even though the process was lawfully issued, if the process was used for an ulterior purpose for which it was not intended.

4. The filing of a lis pendens is absolutely privileged.

5. Plaintiffs are not liable to defendants for abuse of process.

6. None of defendants' counterclaims against plaintiffs has merit.

7. Defendants' counterclaims that were, or could have been, brought in this action should be dismissed with prejudice and on the merits.

DATED this 12th day of Dec. 1996.

BY THE COURT:

Honorable Pat B. Brian
Third District Court Judge

THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY
OF UTAH

Approved as to form:

BURDIGE & MITCHELL

_____

Richard D. Burbidge
Attorneys for Defendants Jon Olch
and Janet Olch

_____

Robert Felton
Attorneys for Defendants 330 Main
Street Partners and Henry Sigg

JONES, WALDO, HOLBROOK & McDONOUGH

_____

Paul Van Dam
Bruce Wycoff
Attorneys for Plaintiffs

CLERK'S CERTIFICATE

On this 13th day of ~~August~~ Dec, 1996, pursuant to Rule 77(d), Utah Rules of Civil Procedure, and following entry thereof, I hereby certify that I caused to be mailed, via first class United States mail, postage prepaid, a true and accurate copy of the foregoing Findings of Fact and Conclusions of Law to the following:

R. Paul Van Dam
Bruce Wycoff
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, UT 84145-0444

Richard D. Burbidge
Burbidge & Mitchell
139 East South Temple, Suite 2001
Salt Lake City, UT 84111

Robert Felton
39 Exchange Place, #200
Salt Lake City, UT 84111

Debbie K. Foust